

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

LAURIE FOSTER MITCHELL

*Plaintiff,*

V.

CASE NO. 4:11-CV-716  
Judge Clark/Judge Mazzant

THE BANK OF NEW YORK MELLON  
TRUST COMPANY, NATIONAL  
ASSOCIATION F/K/A THE BANK OF  
NEW YORK TRUST COMPANY, N.A. AS  
SUCCESSOR TO JPMORGAN CHASE  
BANK, N.A., AS TRUSTEE, GMAC  
MORTGAGE, LLC, SERVICER-IN-FACT  
FOR THE BANK OF NEW YORK  
MELLON TRUST COMPANY, NATIONAL  
ASSOCIATION F/K/A THE BANK OF  
NEW YORK TRUST COMPANY, N.A.  
AS SUCCESSOR TO JPMORGAN  
CHASE BANK, N.A., AS TRUSTEE

### *Defendants.*

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On November 30, 2012, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that defendants' Motion for Summary Judgment [Doc. #33] be denied [Doc. #37]. On December 13, 2012, defendants filed objections to the report [Doc. #38]. On December 27, 2012, plaintiff filed a response to the objections [Doc. #40].

Defendants first object that the Magistrate Judge erred because the report did not address the

undisputed fact that defendant GMAC Mortgage, LLC (“GMACM”) is the loan servicer for the loan. Plaintiff responds that no error occurred because defendants did not argue in their motion that it is undisputed that GMACM is the servicer for the Deed of Trust covering plaintiff’s homestead. Defendants’ motion is not a model of clarity. Although defendants do discuss briefly that GMACM is the servicer of the loan, it is not clear that defendants were asking for summary judgment on that ground as compared to the assignment of the loan to defendant The Bank of New York Mellon Trust Company, N.A. f/k/a The Bank of New York Trust Company, N.A., as Successor to JPMorgan Chase Bank, N.A., as Trustee (“BONYM”). The court cannot say that the Magistrate Judge erred in failing to address an argument that was not clearly made in defendants’ motion. Moreover, even if the argument had been made properly, the court does not see that it is undisputed that GMACM is the servicer. Defendants failed to offer sufficient summary judgment evidence for the court to determine as a matter of law that GMACM is the servicer of the loan.

Defendants next object that the report should be rejected because the exhibits to the Montoya Declaration are public records and therefore admissible regardless of any perceived deficiencies with the Montoya Declaration itself. The Magistrate Judge found the Montoya Declaration deficient and struck it. Defendants assert that the documents attached are public records. Plaintiff correctly points out that this argument was not made before the Magistrate Judge. In addition, although the documents may be public records, defendants failed to offer them in an admissible form. The Magistrate Judge found that the other exhibits were not in admissible form and would not be considered. The court finds no error.

Defendants next objects to the Magistrate Judge’s striking of the Montoya Declaration. The Magistrate Judge found that “[a]lthough a senior analyst can prove up records in a mortgage case,

the Montoya Declaration fails to reach that threshold. The court has previously overruled objections to an affidavit in a mortgage case, but in that case the affidavit provided more information than was provided in this case,” citing to 4:10cv590 (E.D. Tex. May 7, 2012) (Dkt. #41). The court agrees with the Magistrate Judge that the Montoya Declaration fails to meet the necessary threshold, and was therefore properly stricken.

Now realizing their mistake, defendants attempt to correct the evidentiary mistake by attaching to the objections a new Montoya Declaration. The court rejects defendants’ late attempt. The court finds that defendants had the opportunity to present a proper motion for summary judgment and failed in that effort. This case can proceed to trial.

Having received the report of the United States Magistrate Judge, and considering the objections thereto filed by defendants, this court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge’s report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that defendants’ Motion for Summary Judgment [Doc. #33] is DENIED.

So **ORDERED** and **SIGNED** this 24 day of **January, 2013**.



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Ron Clark  
Ron Clark, United States District Judge